CIRCUIT COURT OF CAMPBELL COUNTY.

THOMS v. FRANKLIN.

1. INSANE PERSONS—*Appointment of committee—Necessity of notice to insane person—Due process of law—Va. Code, sec. 1698.* Though not in terms required by the statute, the appointment of a committee for an insane person, under section 1698 of the Code, must be after due notice to the insane person himself. An appointment made without such notice is absolutely void.

SAUNDERS, Circuit Judge:

This proceeding on the part of Alex Thoms, the committee of Nannie Thoms, is to set aside a contract made by Nannie Thoms with one Albert Franklin.

The bill alleges that Nannie Thoms has always been of very weak mind, and that on the application of Alex Thoms to the County Court of Campbell county, he was appointed her committee.

There is no allegation that Nannie Thoms was ever otherwise adjudged to be insane, nor does such appear to be the fact.

The order of the County Court is as follows:

"On the motion of Alex. Thoms he is permitted to qualify as committee of Nannie Thoms, a person of unsound mind; . . . ."

This proceeding was under the authority of section 1698 of the Code, purporting to be amended by Acts 1899-1900, p. 1045, though no change was made, which is as follows:

"If a person residing in this state, not so found (referring to ascertainment of lunacy under section 1697), be suspected to be insane, the court of the county, or corporation, of which such person is an inhabitant, shall on the application of any party interested, proceed to examine into his state of mind, and being satisfied that he is insane, shall appoint a committee for him."

By section 1702 of the Code, the committee of an insane person is entitled to the custody and control of his person, when he resides in the state and is not confined in an asylum or jail, and shall take possession of his estate, and may sue, and be sued, in respect thereto. See same section for other duties powers and responsibilities of the committee.

It is contended in this case that the appointment of the committee of Nannie Thoms was without notice to her, and therefore not due

process of law. If this position is well taken the appointment is void and without effect.

Another immediate consequence of this contention, if correct, is that Alex Thoms in his alleged capacity of committee of Nannie Thoms, is without authority to prosecute the pending suit, and his bill must be dismissed.

On behalf of Nannie Thoms' committee it is urged that in respect to the appointment of committees of insane persons, the county courts are courts of general jurisdiction, and that in respect to this particular appointment, it will be presumed that everything was properly done, including notice, if notice be necessary, to the alleged lunatic.

I am not prepared to say that this proposition is fully sustained by the authorities, but it may be conceded *arguendo* that as to these appointments, the county courts are courts of general jurisdiction. But another proposition, not to be lost sight of in this enquiry, is that where there is no process served upon a party, no effort made to make him a party to proceedings in which he is sought to be affected in his person, or his property, then as to him the court in such case is without jurisdiction, and its orders are void.

It is true that in some cases a person is presumed to have had notice, when as a matter of fact no notice has been given.

For the main proposition, *supra,* see *Blanton* v. *Carroll,* 86 Va. 539; *Gray* v. *Stewart,* 33 Gratt. 351, and *Lowell* v. *McCurdy,* 77 Va. 763; *Underwood* v. *McVeigh,* 23 Gratt. 418-419; *Mary,* 9 Cranch 126-144; 93 U. S. 274; *Hess* v. *Gayle,* 93 Va. 470; 90 Va. 472; 82 Va. 362; 92 Va. 207; 82 Va. 696; 88 Va. 801; 90 Va. 423.

The application to the county court in this case was plainly made under section 1698, and that section contemplates an *ex parte* application. There is no requirement of notice, and no suggestion that it is necessary or should be given. If therefore the presumption is entertained that the court proceeded regularly, there is no occasion to presume that it proceeded otherwise than as the statute directs. It is not to be presumed that the court did more, or required more to be done, than the statute itself requires.

But it is further urged in support of the action of the county court that Nannie Thoms may have been adjudged a lunatic in formal proceedings before the justices and that the appointment of her committee was under section 1697.

If such previous adjudication was shown to be the fact, or rather

if the evidence was silent on this point, the presumption might be drawn that the appointment of the committee was based upon a prior adjudication of lunacy; but the evidence clearly shows that no such proceedings were ever instituted—and that the appointment of the committee was without notice to Nannie Thoms. (See deposition of Alex. Thoms). It is stated in his testimony that, on account of the weakness of her mind, it was not considered necessary to give the alleged lunatic any notice.

Nothing in the order of the county court suggests that there was notice, or raises any presumption of notice. The proceedings in that court were in conformity with the statute, which, as we have seen, does not require notice. Nor can we presume contrary the evidence, that there was a prior formal adjudication of lunacy in proper proceedings against Nannie Thoms. It therefore remains for the court to decide whether a committee of a person suspected to be insane who is appointed without notice to the party who is to be seriously affected in his person and property rights, is legally and validly appointed. There have been many decisions on this precise question in other states, and a few will be cited.

In *Evans* v. *Johnson,* 39 W. Va., it is said: "It lies at the foundation of justice in all legal proceedings that the person to be affected have notice of such procedings. Will it be said that he is insane, and that notice to an insane person will do him no good? The reply is that his sanity is the very question to be tried, and he is the only party interested in the issue. Almost as well might we convict a man of crime without notice. Although the statute may be silent, the common law steps in, and requires it. I maintain that such action as the appointment of a committee for one as insane, without notice, is so grave in its effects upon his personal status, his right to vote, liberty and property, that it is not due process of law."

See also Buswell on Insanity, sec. 55, and Cunning & Gilbert on Insanity, 173; *McMurray* v. *Hooper*, 46 Am. Dec. 280; *Hutchins* v. *Johnson*, 30 Am. Dec. 624; *In re Mays*, 10 Pa. County Ct. Rep. 283. The question has recently come before the Supreme Court of Missouri, a state in which for fifty years, the courts of probate, pursuant to statute, have undertaken to adjudicate certain cases of insanity without notice to the alleged insane person. The following extracts are taken from the opinion of the court, in *Hunt* v. *Searcy,* 167 Mo. 159:

"The words 'law of the land,' mean the same thing as 'due process

of law'—and imply notice as a necessary prerequisite to any judgment of insanity, or otherwise, which deprives a party of either liberty, or property, whether the notice is made necessary by the statute, or not. A judgment of insanity without notice to the person adjudged insane, and without appearance, is void, whether the statute requires such notice, or not. To argue that, if the defendant in an insanity proceeding is insane, a notice to him would be meaningless, and an idle procedure, is to beg the question: for the issue to be tried is whether he is or is not insane, and to fail to give him notice, for this reason, is to prejudge him, or forestall the very purpose of the inquest."

In judicial proceedings, due process of law requires notice, hearing, and judgment. The fourteenth amendment to the constitution of the United States provides as follows:

"Nor shall any state deprive any person of life, liberty, or property, without due process of law." Sec. 2 of Art. I of the present constitution of Virginia, is in the following words:

"No person shall be deprived of his property without due process of law . . . ."

It is plain from the foregoing authorities, and from reason, that the *ex parte* appointment of Alex Thoms as committee of Nannie Thoms was void. If the court undertook to formally ascertain her to be a lunatic, she was certainly entitled to notice, in order to resist this determination. If, without formally ascertaining her to be insane, it undertook, upon belief of her insanity, to treat her as an insane person, and to appoint a committee for her person and property, she was equally entitled to notice. Without notice, there was no due process of law.

There is always present the possibility of gross outrages in *ex parte* proceedings. An illustration in point is found in the Missouri case *supra,* which gives the instance of a man who, without notice, was adjudged insane in that state, and who at the next term of the court appeared, and proved that he was not, and never had been, insane.

. . . . . .

In the case of *Hess* v. *Gayle,* 93 Va. 469, cited *supra,* the dower of an insane wife was commuted on the *ex parte* application of the husband. On appeal this action of the *nisi prius* court was declared to be fundamentally erroneous, and the proceedings, so far as they

sought to affect the dower rights of the wife, were pronounced to be null and void.

This case is an instructive one, resting upon the principle that proceedings without notice, designed to affect a citizen in some substantial right of person or property, are "not due process of law."

It would seem to be an *a fortiori* proposition that if an actually insane wife cannot be deprived of dower without notice, a person presumably sane cannot be judged to be insane, in *ex parte* proceedings.

A decree in conformity with the conclusions announced in this opinion may be forwarded for endorsement.

EDITORIAL NOTE.—This ruling seems to be in accord with the weight of authority. In addition to the cases cited in the opinion, see *Molton* v. *Henderson*, 62 Ala. 426; *Arrington* v. *Arrington*, 32 Ark. 674; *Eddy* v. *People*, 15 Ill. 356; *In re Wellman*, 3 Kan. App. 100, 45 Pac. 726; *Hathaway* v. *Clark*, 22 Mass. 490; *In re Whitmack*, 3 N. J. Eq. 252; *In re Russell*, 1 Barb. Ch. (N. Y.) 38—holding further that where it is evident that the alleged lunatic keeps out of the way to avoid service, notice is not necessary; *Ex parte Dozier*, 63 Tenn. 81; *Lance* v. *McCoy*, 34 W. Va. 416, 12 S. E. 728—enforcing requirements of Code 1887, c. 58, section 38. *Contra*, *Fore* v. *Fore*, 44 Ala. 478; *Hutts* v. *Hutts*, 62 Ind. 214; *In re Blewitt*, 61 Hun, 568, where the failure to give notice is pronounced "a grave irregularity" but not fatal where the petition presumably shows incompetency of the alleged lunatic to manage his affairs. The Maine statute requires notice to be given to the municipal officers, and the requirement is mandatory. *Holman* v. *Holman*, 80 Me. 139, 13 Atl. 576. In Michigan the statute requires notice to the lunatic and his next of kin—in New York, to the husband, wife or relatives. In *Lackey* v. *Lackey*, 47 Ky. 107, it was held that where the inquisition is in open court there is no necessity for notice or writ, the chancellor being the protector of persons of unsound mind.